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No. 00-593

# In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF UTAH, ET AL., PETITIONERS

*v.*

US WEST COMMUNICATIONS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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## QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbent carriers' network elements. The Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state public utility commission's voluntary acceptance of Congress's offer to exercise regulatory authority pursuant to the scheme set forth in the 1996 Act constitutes a waiver of immunity from suit in federal court, where the Act clearly provides for review in federal court of a state commission's actions.

2. Whether, in the alternative, the commissioners of a state public utility commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking prospective injunctive relief from orders by the state commission alleged to violate federal law.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-43) is reported at 216 F.3d 929.

### JURISDICTION

The judgment of the court of appeals was entered on June 20, 2000. The petition for a writ of certiorari was filed on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition."

H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the existing network, a prospective competitor could not gradually enter the

market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the 1996 Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration in the event that the parties cannot

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[1] All citations of the 1996 Act are of Supp. IV 1998.

conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(e)(6).

b. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission (FCC) will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. A negotiated agreements is subject to review by the state commission (or, if the state commission chooses not to regulate, by the FCC) to determine whether the agreement discriminates against non-party carriers and is consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state public utility commission (or, if the state commission chooses not to regulate, the FCC) will resolve any open issue, including the rates, terms, and conditions under which competitors will enter the local market, as well as prices that the incumbent and the new entrant will pay one another for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). An arbitrated agreement is subject to

review by the state commission to determine whether the agreement complies with Sections 251 and 252 of the 1996 Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission approving or rejecting an interconnection agreement may file suit in federal district court for a determination "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the State has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. The Public Service Commission of Utah (UPSC) has voluntarily exercised regulatory authority under the 1996 Act. After new entrants AT&T and MCI failed to reach agreement with incumbent carrier US West on certain interconnection issues, the UPSC resolved disputed issues and issued an arbitration order directing the parties to file executed interconnection agreements consistent with its order. The UPSC then approved the submitted interconnection agreements under Section 252(e).

Various parties sought review of the UPSC's order approving the interconnection agreements. Acting pursuant to Section 252(e)(6), US West and MCI filed suit in federal district court against each other, the UPSC, and the individual commissioners of the UPSC seeking review of the UPSC's actions.

The UPSC and its individual commissioners moved to dismiss on the ground that the Eleventh Amendment

barred suit against them in federal court. The United States and the FCC intervened to defend the constitutionality of the 1996 Act. The district court denied the motion to dismiss. Pet. App. 45-58. The court held that the State, through the UPSC, had waived its sovereign immunity from suit under the Act by voluntarily engaging in the regulation of interconnection agreements, see *id.* at 54-56, and that the commissioners of the UPSC were amenable to suit under the exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), see Pet. App. 45-53.

3. The Tenth Circuit affirmed. The court of appeals held that "Utah voluntarily waived its sovereign immunity when the UPSC, through its commissioners, arbitrated the interconnection dispute in this case." Pet. App. 37-38. In the alternative, the court held that "[e]ven if the Eleventh Amendment barred US West's suit against the UPSC, US West still could proceed with suit against the individual commissioners" because such a suit is a "straightforward *Ex parte Young* case." *Id.* at 39.

a. Turning first to the question of waiver, the Tenth Circuit noted that a State may waive its Eleventh Amendment immunity in one of two ways: by voluntarily invoking the jurisdiction of a federal court or by making a "clear declaration" of consent to be sued in federal court. Pet. App. 21-22. Because the UPSC had not invoked the jurisdiction of a federal court and had not expressly consented to suit through a statute or constitutional provision, the court focused exclusively on the question "whether, under *College Savings Bank* [v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)], Utah constructively waived its immunity from suit when it arbitrated an intercon-

nection dispute between US West, AT&T and MCI pursuant to § 252 of the Act." Pet. App. 23-24.

While recognizing that *College Savings Bank* overruled the "forced" waiver doctrine—whereby a State was deemed to have waived its immunity merely by participating in activities governed by various federal statutes—the Tenth Circuit noted that *College Savings Bank* did not eliminate all forms of implied waivers. The court explained that such a waiver is valid if it is "altogether voluntary and not forced from a state by Congress." Pet. App. 29. The court emphasized that a waiver is voluntary "where Congress threatens a state with the denial of a 'gift or gratuity' if the state refuses to consent to suit in federal court"; where Congress threatens a state with a "sanction," however, "then the waiver is no longer freely given." *Ibid.*

The court of appeals next explained that *College Savings Bank*, in its references to *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), recognized the kinds of conditions that Congress may still place on States. Pet. App. 29-30. In those cases, the court noted, Congress conditioned a grant to which a State was not otherwise entitled (federal funds in *Dole* and the authority to enter an interstate compact in *Petty*) upon the State's acceptance of certain conditions that Congress could not otherwise have mandated (a lower drinking age in *Dole*, and a waiver of Eleventh Amendment immunity in *Petty*). *Id.* at 30. In contrast, the court explained, in both *Parden* and *College Savings Bank* "Congress threatened a sanction: 'exclusion of the State from otherwise permissible activity.'" *Id.* at 31.

In analyzing the 1996 Act under the principles derived from *College Savings Bank*, the court of appeals

found that "Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity." Pet. App. 33. The court noted, however, that "Congress's intent to effect a waiver is insufficient, standing alone, to render a state's waiver altogether voluntary." *Id.* at 34. Thus, the court explained, "Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction." *Ibid.*

While acknowledging that "states were permitted to regulate local phone service" before 1996, the court of appeals noted that, "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity." Pet. App. 34, 36. "As in *Petty* and *Dole*," the court explained, "Congress was under no obligation to allow states to participate in the Act's regulatory scheme." *Id.* at 36. Thus, the court reasoned, "by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *Ibid.*[2]

b. In the alternative, the court of appeals held that suit could proceed against the commissioners of the UPSC under *Ex parte Young*. Pet. App. 39. Citing the Sixth Circuit's holding on that question in *Michigan*

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[2] In response to the UPSC's argument that the 1996 Act imposes a "sanction" rather than a gratuity upon the State by excluding it from regulating interconnection agreements if it elects not to waive its immunity, the court of appeals noted that "§ 252 removes only a slice of regulatory authority from a state if it declines to waive its sovereign immunity." Pet. App. 36-37 n.6.

*Bell Telephone Co.* v. *Climax Telephone Co.*, 202 F.3d 862, cert. denied, 121 S. Ct. 54 (2000), the court of appeals noted that the case before it was "a straightforward *Ex parte Young* case." Pet. App. 39. The court rejected the UPSC's argument that *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), "narrowed the *Ex parte Young* doctrine so as to make it inapplicable to this case." Pet. App. 40 n.8. While acknowledging that courts must examine whether the relief requested under *Ex parte Young* implicates "special sovereignty interests," the court held that the declaratory and injunctive relief requested under the 1996 Act "would not affect any special sovereignty interests or otherwise cause offense to Utah's sovereign authority." *Ibid.*

## ARGUMENT

The Tenth Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, to the extent that other courts of appeals have considered the issues presented in this case, they have reached the same conclusions as did the Tenth Circuit. See *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) (finding no Eleventh Amendment bar on both waiver and *Ex parte Young* grounds), petitions for cert. pending, Nos. 00-653, 00-744; *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.) (basing decision solely on *Ex parte Young*), cert. denied, 121 S. Ct. 54 (2000).[3] This Court's review is therefore not warranted.

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[3] Petitioners contend (Pet. 18 & n.10) that there is a "split between the federal courts" on the question of implied waiver of immunity under the 1996 Act, but petitioners cite only district court decisions in which appeals on that issue are pending. Although the Sixth Circuit stated in a footnote that the 1996 Act

1. The court of appeals correctly held that state public utility commissions waive their immunity from suit in federal court by voluntarily accepting Congress's offer to exercise federal regulatory authority pursuant to the scheme established by the 1996 Act to promote competition in local telecommunications markets. The Act provides that a regulatory body will exercise authority, subject to review in federal court, over agreements between incumbent carriers and new entrants pursuant to the Act (*i.e.*, agreements concerning interconnection, access to network elements, resale of services, etc.). See 47 U.S.C. 251, 252. If that responsibility is undertaken by the FCC, pursuant to 47 U.S.C. 252(e)(5), the FCC's actions are reviewable in a federal court of appeals, as provided in the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998). If, in the alternative, a state commission accepts Congress's offer of regulatory authority under the Act, the State commission does so with full knowledge that the Act permits aggrieved parties to seek "[r]eview of State commission actions" in federal district court. 47 U.S.C. 252(e)(6). Thus, the 1996 Act clearly puts the States on notice that, if they elect to participate in the federal regulatory scheme, they will do so subject to review of their actions in federal court.[4]

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"cannot legitimately be construed as a valid waiver of sovereign immunity," *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 922 n.6, cert. denied, 121 S. Ct. 380 (2000), the court's mention of waiver in that case was plainly dicta because review was permitted under *Ex parte Young*. A waiver theory was never briefed or argued in that case because the district court's jurisdiction over the preemption claim was based solely on 28 U.S.C. 1331, not Section 252(e)(6).

[4] Notably, petitioners do not contend that the 1996 Act lacks sufficient clarity to put States on notice that their regulation of

The Tenth Circuit's decision that States waive their Eleventh Amendment immunity by assuming a regulatory role under the 1996 Act is fully consistent with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). *College Savings Bank* does not suggest that Congress cannot condition a State's exercise of regulatory authority under a federal statute—authority that would otherwise be exercised by a federal agency, subject to review in federal court—on the State's amenability to review of its exercise of that regulatory authority in federal court. To the contrary, *College Savings Bank* confirms that Congress's ability to impose conditions on a State's voluntary exercise of federal authority is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). See 527 U.S. at 675-687.[5]

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interconnection agreements under Sections 251 and 252 is reviewable in federal court.

[5] The *Parden* doctrine applied when a State took part, as would a private party, in federally regulated activity and thereby became subject to controlling federal law. Thus, under the *Parden* doctrine, States that engaged in enterprises governed by federal statutes—such as the Lanham Act or the Patent Act—were viewed as having consented voluntarily to suit under those statutes. As Justice Scalia suggested as early as his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 41-45 (1989) (Scalia, J., dissenting in part), *Parden* waivers accomplished the same result as a federal abrogation of state immunity for actions in a regulated area. Once the Court overruled *Union Gas*, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and declared Congress without authority to abrogate immunity under its Article I powers, the *Parden* doctrine lost vitality. As this Court explained in *College Savings Bank*, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." 527

*College Savings Bank* makes clear, as the Tenth Circuit and numerous other courts of appeals have recognized, that a State may constructively waive its immunity in certain contexts.[6] In particular, the Court reaffirmed its holding in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that "a bistate commission which had been created pursuant to an interstate compact * * * had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Sav. Bank*, 527 U.S. at 686. The Court explained that, in *Petty*, Congress was simply imposing a condition on a grant of authority that the State would not otherwise possess, because States cannot form interstate compacts without obtaining congressional approval. In that sense, Congress's action in *Petty* was a "gratuity" in the same sense as the disbursement of federal funds, a context in which it is well established that Congress may condition state participation on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

As in *Petty* and *Dole*, this case involves a condition imposed on a "gratuity"—which a State may freely choose to accept or reject—in the same sense as the conditional grant of congressional approval of the inter-

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U.S. at 683. Accordingly, because Congress could not abrogate States' sovereign immunity for violations of the Lanham Act, neither would a State be held to have impliedly waived its immunity by engaging in conduct subject to that Act.

[6] See *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999) (finding waiver of immunity based on acceptance of federal funds), cert. granted on other grounds *sub nom. Alexander* v. *Sandoval*, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 566 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1220 (2000); *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281 (10th Cir. 1999) (same), cert. denied, 120 S. Ct. 1530 (2000).

state compact in *Petty*. As the Court observed in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6. Congress allowed the States to play a role in that regulation, but it has conditioned that role on federal judicial review to ensure compliance with the new federal standards. Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the Act does not allow the States simply "to do their own thing," and "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Ibid.*[7]

Petitioners contend (Pet. 22) that state commissions cannot be deemed to have waived their Eleventh Amendment immunity, because the authority to regulate interconnection agreements cannot properly be viewed as a "gratuity" within the meaning of *College Savings Bank*. Petitioners' contention reflects a fundamental misunderstanding of the changes wrought by the 1996 Act. As the court of appeals recognized (Pet. App. 35-36), Congress could, and did, take over certain

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[7] The question whether the Eleventh Amendment protects States from suit under the Act was not at issue in *Iowa Utilities Board*. Nor is that question presented in the pending petitions for a writ of certiorari arising from the Eighth Circuit's decision on remand in *Iowa Utilities Board*. Those petitions instead involve the rules promulgated by the FCC to implement the substantive requirements of Section 251(c). See *Verizon Communications, Inc.* v. *FCC* (No. 00-511); *WorldCom, Inc.* v. *Verizon Communications, Inc.* (No. 00-555); *FCC* v. *Iowa Utils. Bd.* (No. 00-587); *AT&T* v. *Iowa Utils. Bd.* (No. 00-590); *General Communications, Inc.* v. *Iowa Utils. Bd.* (No. 00-602).

aspects of local telecommunications regulation from the States. Far from preserving the status quo, the Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in the areas encompassed by the Act only to the extent consistent with the Act and implementing FCC regulations. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to provisions of federal law. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Emphasizing that "Utah law had already required telecommunications companies to interconnect their networks and provide reciprocal access to their networks' facilities and services" before the 1996 Act, petitioners contend (Pet. 23 & n.11) that "[t]he source of the states' police power does not derive from a congressional gratuity." But the existence of prior state regulation in the area now covered by Sections 251 and 252 is irrelevant to whether the new regulatory authority granted to the States by the Act is a gratuity. While the Act permits States to regulate in that area, the Act confers that authority as part of the new federal scheme. Indeed, by citing various provisions of the Act that allegedly authorize the States to exercise their "traditional police power" in that area (Pet. 24), petitioners only emphasize that the authority to regulate interconnection agreements now flows exclusively from the Act.[8]

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[8] To be sure, while Congress has "taken the regulation of local telecommunications competition away from the States" with re-

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for incumbents and new entrants to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions in such agreements. Thus, the regulation of interconnection agreements, as creatures of federal law, is not an "otherwise permissible activity" under *College Savings Bank*. Instead, such regulation is akin to a "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act

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spect to "matters addressed by the 1996 Act," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, Congress has not taken over the regulation of all aspects of local telecommunications. And Congress preserved the ability of the States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 261(b) and (c). But the fact that Congress did not supplant state regulation in every possible respect does not undermine the court of appeals' waiver analysis; the court held that the States waived their sovereign immunity from suit in federal court only with respect to those matters in which Congress *has* supplanted state regulation.

while simultaneously rejecting the federal judicial review that is a critical part of the regulatory scheme.[9]

2. The court of appeals' independent basis for decision—that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit for prospective relief against the commissioners of the UPSC (Pet. App. 39-41)—is also correct and in accord with the decisions of the only courts of appeals that have addressed the issue. See *Illinois Bell*, 222 F.3d at 345; *Michigan Bell*, 202 F.3d at 867. Indeed, this Court has already denied petitions for certiorari in two cases raising the precise arguments against *Ex parte Young* review that petitioners present here. See *Strand* v. *Michigan Bell Tel. Co.*, 121 S. Ct. 54 (2000) (No. 99-1878); *Strand* v. *Verizon North Inc.*, 121 S. Ct. 380 (2000) (No. 00-101). No different result is warranted in this case.[10]

This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude a suit that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State*

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[9] Petitioners contend (Pet. 25) that it would be anomalous to conclude that the Eleventh Amendment precludes suit "when a state acts like an ordinary market participant" but not "where a state acts as a sovereign." But that asserted anomaly depends on petitioners' flawed understanding of the source of state regulatory authority under the 1996 Act—as a function of state sovereignty rather than a gratuity from Congress conditioned upon amenability to review of state commission actions in federal court.

[10] Petitioners acknowledge (Pet. 26 n.13) that the issues raised in the *Ex parte Young* portion of their petition "are identical or similar to" the issues raised in the cases that the Court has already declined to review.

*Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 102 (1984); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105; accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).[11]

The court of appeals correctly held that suits seeking prospective injunctive relief under the 1996 Act are permitted under *Ex parte Young*. In naming the commissioners of the UPSC as parties in a suit seeking review of the UPSC's determinations under Section 252(e)(6), the parties seek to have the commissioners conform their future actions with federal law. That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (Kennedy, J.) (observing that *Ex parte Young* and its progeny teach that "where prospective relief is sought against individual state officers in a federal forum based on a federal

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[11] There can be no doubt that *Ex parte Young* is not limited to suits alleging *constitutional* violations. The exception applies equally where the state official's conduct is alleged to violate a federal statute. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 n.6 (1978); see also *Edelman* v. *Jordan*, 415 U.S. 651, 665-671 (1974) (presupposing same). Otherwise, *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Coeur d'Alene Tribe*, two cases on which petitioners rely, could have been disposed of on much simpler grounds, as neither case involved an alleged federal constitutional violation.

right, the Eleventh Amendment, in most cases, is not a bar").[12]

Petitioners argue principally (Pet. 27-29) that the *Ex parte Young* exception is unavailable in this case because such review is improper under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).[13] But *Seminole Tribe* involved what the Court described as a "carefully crafted and intricate remedial scheme" that made only a "modest set of sanctions" available to aggrieved parties in federal court. *Id.* at 73-75. Here, in contrast, Congress did not similarly restrict the remedies available in federal court to parties aggrieved by actions of state commissions under the 1996 Act.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, that established a framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith was an order directing

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[12] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether *Ex parte Young* relief is available against state officials is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

[13] Petitioners also briefly assert (Pet. 29) that the Tenth Circuit's decision is wrong because it "permits anticipatory pleading to transform what is otherwise a request to review a past administrative agency decision into an *Ex parte Young* proceeding in federal court." But the effects of the UPSC's decision are ongoing and thus subject to review under *Ex parte Young*. Indeed, as the Fourth Circuit has explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir.), cert. denied, 525 U.S. 821 (1998).

the State to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then prescribe regulations. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal courts to provide, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that the Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.[14]

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the 1996 Act. In contrast to the statute in *Seminole Tribe*, the

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[14] As noted in the text, the Court's focus in *Seminole Tribe* was on the "carefully crafted and intricate" statutory scheme governing the remedies available once the dispute reached federal court. The Court concluded that, because Congress had specified only a "modest set of sanctions" to be imposed in federal court, Congress did not intend that additional remedies be available under *Ex parte Young*. See 517 U.S. at 74-76. That reasoning does not apply where, as under the 1996 Act, Congress has not restricted the remedies available in federal court. It is thus irrelevant whether the regulatory process, which precedes the judicial process provided for under the Act, might itself be characterized as "carefully crafted and intricate."

1996 Act does not narrowly circumscribe the remedies available in federal court to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or rejected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is thus fully consistent with the remedy contemplated by Congress. It does not expand the remedies or scope of judicial review available under the Act. Thus, the court of appeals correctly held here that *Ex parte Young* provides an independent basis for suit against individual state public utility commissioners to obtain review of their actions under the 1996 Act.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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